LIBRARY
SUPREME COURT, U. S.

FILED
JAN 21 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. 962

CLAUD T. PATAT, JR., JOHN L. FARRIS and
PATAT PLYWOOD CORPORATION,
Petitioners,

versus

THE DAY COMPANIES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

HOSEA ALEXANDER STEPHENS,
2400 First National Bank Building,
Atlanta, Georgia 30303,
Attorney for Petitioners.

MARSON G. DUNAWAY, JR.,
301 South Marble Street,
Rockmart, Georgia 30153,

SMITH, COHEN, RINGEL, KOHLER, MARTIN
& LOWE,
2400 First National Bank Building,
Atlanta, Georgia 30303,
Of Counsel.

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CEntral 1-4477.

INDEX.

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes presented	3
Statement of the case	3
Reasons for granting the writ	6
I. Decision in conflict with applicable Georgia law	6
II. Court failed to apply latest Georgia decision	9
III. The decision overturned a clearly permissible result under Georgia law	10
Conclusion	10
Appendix I—Order of District Court on defendant's motion to dismiss	A-1
Appendix II—Opinion of the United States Court of Appeals for the Fifth Circuit	A-10
Appendix III—Judgment of Court of Appeals	A-18
Appendix IV—Order denying petition for rehearing	A-20

Cases Cited.

Angel v. Bullington, 330 U. S. 183	8, 10
Artistic Ornamental Iron Co. v. Wilkes, 213 Ga. 654, 100 S. E. 2d 731	7
Bonner v. Bailey, 152 Ga. 629, 110 S. E. 875	7
Citizen's Insurance Company v. Foxbilt, Inc., 8 Cir., 226 F. 2d 641	10
Dixie Bearings, Inc. v. Walker, 219 Ga. 353, 133 S. E. 2d 338	7

Erie Railroad Company v. Tompkins, 304 U. S. 64 ... 6, 8
Everett v. Boone, 157 Ga. 372, 121 S. E. 240 ... 7

Fox v. Avis Rent-A-Car Systems, Inc., 223 Ga. 571, 156 S. E. 2d 910 ... 9, 10

Glosser v. Powers, 209 Ga. 149, 71 S. E. 2d 230 ... 7
Guaranty Trust Company v. York, 326 U. S. 99 ... 6, 8

Hanley v. Savannah Bank and Trust Company, 208 Ga. 585, 68 S. E. 2d 581 ... 7

Luther v. Maple, 8 Cir., 250 F. 2d 916, 922 ... 10

Meredith v. City of Winter Haven, 320 U. S. 328 ... 6, 9
Middle Atlantic Utilities Co. v. S. M. W. Development Corp., 2 Cir., 392 F. 2d 380, 384 ... 9

Orkin Exterminating Co. v. Dewberry, 204 Ga. 794, 802, 51 S. E. 2d 669 ... 7

Seay v. Spratling, 133 Ga. 27, 30, 65 S. E. 137 ... 7
Strauss v. Phillips, 180 Ga. 641, 180 S. E. 2d 123 ... 8
Sudderth v. National Lead Company, 5 Cir., 272 F. 2d 259, 263 ... 10

Vandenbark v. Owens Illinois Glass Company, 311 U. S. 538 ... 6, 9

Woods v. Interstate Realty Co., 337 U. S. 535 ... 8

Statutes Cited.

Georgia Code, Section 20-504 ... 3, 6
28 U. S. C., Section 1254 (1) ... 2
28 U. S. C., Section 1332 (a) (1) ... 2
28 U. S. C., Section 1652 ... 2, 3, 6

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. .....

CLAUD T. PATAT, JR., JOHN L. FARRIS and
PATAT PLYWOOD CORPORATION,
Petitioners,

versus

THE DAY COMPANIES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit.

Claud T. Patat, Jr., John L. Farris, and Patat Plywood Corporation, your petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on November 26, 1968.

OPINIONS BELOW.

The opinions of the District Court, in reality an order dismissing respondent's complaint (R. 23-33) and an order adhering to such dismissal after the complaint was amended (R. 52), have not been reported. Copies are appended as Appendix I.

The opinion of the Court of Appeals has not been reported. A copy is appended as Appendix II.

JURISDICTION.

The judgment of the Court of Appeals (R. 62) was entered November 26, 1968. A Petition for Re-hearing (R. 73) was denied December 23, 1968.

Jurisdiction to issue the writ is invoked, pursuant to the provisions of Title 28, Section 1254 (1), United States Code.

Federal jurisdiction was initally invoked by respondent at the time of filing the original complaint on the ground of diversity of citizenship and amount involved pursuant to the provisions of Title 28, Section 1332 (a) (1), United States Code.

QUESTIONS PRESENTED.

I. Whether, in its opinion reversing the decision of the District Court dismissing respondent's complaint, the Fifth Circuit Court of Appeals contrary to the Rules of Decision Act, Title 28, Section 1652, United States Code, decided an important State question in a way in conflict with applicable Georgia law.

II. Whether, in its opinion reversing the decision of the District Court dismissing respondent's complaint, the Fifth Circuit Court of Appeals failed to apply the most recent interpretation of Georgia law as set forth in decisions of the Supreme Court of Georgia, its court of last resort.

III. Whether, in its opinion reversing the decision of the District Court dismissing respondent's complaint, the Fifth Circuit Court of Appeals has overturned a decision of the District Court which had achieved a clearly permissible result in the application of Georgia law contrary to well established principles of Federal jurisdiction as evidenced by decisions of this Court, its own decisions in other cases, and decisions of other Circuit Courts of Appeals in similar situations.

STATUTES INVOLVED.

The only United States statute involved is **Title 28, Section 1652, United States Code**, which provides:

> "The laws of the several states, except where the constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as Rules of Decision of Civil actions in the courts of the United States, in cases where they apply."

The applicable Georgia Statute is **Georgia Code Section** 20-504 which provides:

> "**Contracts against public policy; illustrations.**—A contract which is against the policy of the law cannot be enforced; such are contracts tending to corrupt legislation or the judiciary, contracts in general restraint of trade, contracts to evade or oppose the revenue laws of another country, wagering contracts, contracts of maintenance or champerty."

STATEMENT OF THE CASE.

The Day Companies, Inc., a Mississippi corporation, alleging itself to be successor by merger to Columbus Packing Company, Inc., invoking jurisdiction upon the basis of diversity of citizenship and amount involved, instituted an action for injunctive relief and damages in the Rome Division of the United States District Court for the Northern District of Georgia against Patat Plywood Corporation, a Georgia corporation, and Claud T. Patat, Jr. and John L. Farris, Georgia residents.

The complaint alleged that Farris Plywood Company, a Georgia corporation of which John L. Farris was president and principal stockholder, located at Cuthbert, Georgia, engaged in the manufacture of plywood, and having earned surplus and undistributed profits in excess

of $400,000.00, was acquired by Columbus Packing Company, Inc. on April 20, 1966, through the purchase of all of its outstanding capital stock for an aggregate sum of $465,000.00, from John L. Farris, Mrs. Nora Lee Farris, Mrs. Lois Farriss McLendon and Carolyn Farris. Claud T. Patat, Jr. was the manager of said corporation.

The contract of sale provided in part that John L. Farris would remain in the employ of the company in an advisory and consulting capacity until December 31, 1966 at a salary of $500.00 per month and contained the further proviso that

> ". . . the said John L. Farris, individually, further agrees that during the term of his said employment, and for a period of five years thereafter (that is, until December 31, 1971) he will not, either directly or indirectly, alone or in concert with any other person, firm or corporation, be connected with or concerned in any business or employment which shall be in competition with Farris in the area presently operated in by Farris."

The contract further provided that the salary of Claud T. Patat, Jr. of $1,000.00 per month would be continued for the remainder of 1966, and that he be paid a bonus of $10,000.00 December 31, 1966, which obligations were complied with by Columbus Packing Company, Inc. All common stock in Farris Plywood Company was transferred to Columbus Packing Company, Inc. which became sole stockholder and owner of Farris Plywood.

It was further alleged that Claud T. Patat, Jr., together with Francis E. Patat and Claud T. Patat, Sr., incorporated Patat Plywood Corporation in Polk County, Georgia, March 15, 1967, which company began business March 22, 1967 with Claud T. Patat, Jr. as President and John L. Farris as Vice President and Treasurer, and that Patat

Plywood Corporation was engaging in the manufacture and production of plywood which it is selling in the same area in which Farris Plywood was operating on April 20, 1966, and in which the Day Companies, Inc. is still operating.

The complaint further alleged that defendants Patat and Patat Plywood Company had knowledge of the terms of the contract signed by John L. Farris, and with full knowledge thereof are aiding and abetting John L. Farris to violate his contract in that he is connected with and concerned in a business and employment in direct competition with the plaintiff in the area operated in by Farris Plywood Company at the time the contract was executed, thereby causing the plaintiff irreparable damage, and that plaintiff had been damaged in the sum of $100,000.00 by the combined acts of the defendants. Injunctive relief and damages in the sum of $100,000.00 were sought.

Defendants filed a Motion to Dismiss pursuant to Rule 12 (b), Federal Rules of Civil Procedure on grounds averring that the covenant not to compete was contrary to public policy of the State of Georgia and therefore null and void, and so indefinite as to the description of the business and employment sought to be prohibited as to be unreasonable.

On February 1, 1968, the District Court entered an order (Appendix I) sustaining the Motion to Dismiss and thereafter on February 28, 1968, a further order (Appendix I) adhering to the previous order sustaining Motion to Dismiss.

Respondent appealed from the dismissal of the complaint (R. 56), and upon review the Fifth Circuit Court of Appeals reversed the judgment of dismissal and remanded the case for further proceeding consistent with the views expressed in its opinion (Appendix II).

REASONS FOR GRANTING THE WRIT.

I. By its decision in the instant case the Fifth Circuit Court of Appeals has decided an important State question in a way clearly in conflict with applicable Georgia law contrary to the Rules of Decision Act (Title 28, Section 1652, United States Code), and thus ignored this court's admonition in **Erie Railroad Company v. Tompkins**, 304 U. S. 64, and **Guaranty Trust Company v. York**, 326 U. S. 99.

II. By its decision in the instant case the Fifth Circuit Court of Appeals failed to follow, and in fact completely ignored, the most recent interpretation of Georgia law as set forth in decisions of the Supreme Court of Georgia, its court of last resort, and thus ignored this court's admonition in **Vandenbark v. Owens Illinois Glass Company**, 311 U. S. 538, and **Meredith v. City of Winter Haven**, 320 U. S. 328.

III. By its decision in the instant case the Fifth Circuit Court of Appeals overturned a District Court decision which reached a clearly permissible result in the application of Georgia Law.

I.

Decision in Conflict With Applicable Georgia Law.

The decision of the Fifth Circuit Court of Appeals is in conflict with applicable Georgia law. The language of the covenant

> ". . . be connected with or concerned in any business or employment which shall be in competition with Farris in the area presently operated in by Farris"

amounts to a contract in general restraint of trade and therefore contrary to the public policy of Georgia as embodied in **Georgia Code Section** 20-504:

"A contract which is against the policy of the law cannot be enforced; such are . . . contracts in general restraint of trade . . ."

The effect of statutory embodiment of public policy was declared by the Supreme Court of Georgia in **Seay v. Spratling**, 133 Ga. 27, 30, 65 S. E. 137, thus:

"Whenever a subject is clearly covered by provisions of the code, questions of public policy and the policy of the law are to be determined by these provisions."

Historically, Georgia has entertained the view that agreements contrary to public policy are to be considered void.

Hanley v. Savannah Bank and Trust Company, 208 Ga. 585, 68 S. E. 2d 581;

Glosser v. Powers, 209 Ga. 149, 71 S. E. 2d 230;

Orkin Exterminating Co. v. Dewberry, 204 Ga. 794, 802, 51 S. E. 2d 669.

General language, of the type and character here presented, has been consistently denied enforcement by the Georgia Courts as indicated by holdings, viz:

Dixie Bearings, Inc. v. Walker, 219 Ga. 353, 133 S. E. 2d 338

"... engage in or become associated with any business competitive to . . ."

Bonner v. Bailey, 152 Ga. 629, 110 S. E. 875

"not to go into business in competition with . . ."

Everett v. Boone, 157 Ga. 372, 121 S. E. 240

"... not operate any business that will conflict in the least with the business sold to and operated by M. E. Everett . . ."

Artistic Ornamental Iron Co. v. Wilkes, 213 Ga. 654, 100 S. E. 2d 731

"... from engaging in a competitive business anywhere in the State of Georgia."

Other holdings to the same effect could be cited. In the face of the foregoing the Fifth Circuit Court of Appeals chose to rest its decision upon **Strauss v. Phillips**, 180 Ga. 641, 180 S. E. 2d 123, in which the language was **specific** rather than general and equated the language of **Strauss v. Phillips** with the language of the contract at bar when the two are not compatible. The difference becomes glaring when the two are set in immediate context:

Case at Bar.	**Strauss.**
". . . be connected with or concerned in any business or employment which shall be in competition with Farris in the area presently operated in by Farris."	". . . enter or engage, directly or indirectly, in the retail jewelry business or the sale of jewelry, silverware, diamonds, or watches, . . ."

In short, the Fifth Circuit Court of Appeals holds that the specific and definite language "retail jewelry business or the sale of jewelry, silverware, diamonds, or watches" is the legal equivalent (at least so far as the present case is concerned) of the non-specific and indefinite language "be connected with or concerned in any business or employment which shall be in competition with Farris". Such a premise is untenable.

The result reached is "substantially different" from that which would have been reached by the Georgia Courts. Grant of certiorari is therefore required by holdings of this Court in:

Erie Railroad Company v. Tompkins, 304 U. S. 64;
Angel v. Bullington, 330 U. S. 183;
Guaranty Trust Company v. York, 326 U. S. 99;
Woods v. Interstate Realty Co., 337 U. S. 535;

and other similar decisions.

II.

Court Failed to Apply Latest Georgia Decision.

In its decision the Fifth Circuit Court of Appeals made no reference to **Fox v. Avis Rent-A-Car Systems, Inc.**, 223 Ga. 571, 156 S. E. 2d 910, which is the latest decision of the Supreme Court of Georgia and, as will appear from the decision of the District Judge (Appendix I), was the decision followed by the District Judge.

Comparison of the covenant involved in **Fox** with the covenant at bar clearly demonstrates the error of the Fifth Circuit Court of Appeals.

Fox.	**Case at Bar.**
". . . not to engage in competition with the company or any subsidiary of the company . . ."	". . . be connected with or concerned in any business or employment which shall be in competition with Farris in the area presently operated in by Farris".

The critical words in each instance are "in competition with" which fly in the face of the public policy of Georgia as set forth in the statute hereinbefore quoted.

The decision of the District Judge, having been predicated upon **Fox** was right and should have been affirmed. Failure of the Fifth Circuit Court of Appeals to follow the **Fox Case** . . . the latest decision by the Supreme Court of Georgia . . . calls for the grant of certiorari as in

Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538

and

Meredith v. City of Winter Haven, 320 U. S. 228

for, as pointed out in **Middle Atlantic Utilities Co. v. S. M. W. Development Corp.**, 2 Cir., 392 F. 2d 380, 384

> "The federal courts must apply the most recent interpretation of state law in diversity cases."

III.

The Decision Overturned a Clearly Permissible Result Under Georgia Law.

The District Judge in dismissing Respondent's complaint reached a clearly permissible result in the application of Georgia Law (Appendix I). Its overturn by the Fifth Circuit Court of Appeals is contrary to decisions of this Honorable Court, other Circuit Courts of Appeal, and other Fifth Circuit decisions.

As to matters of state law this Honorable Court has said, **Brady v. Maryland**, 373 U. S. 83, 90

> ". . . state courts, state agencies, and state legislature are its final expositors under our federal regime."

The dismissal having been persuaded by the most recent decision of the Supreme Court of Georgia, **Fox v. Avis Rent-A-Car Systems, Inc.**, 223 Ga. 571, 156 S. E. 2d 910, was a clearly permissible result which should not have been overturned.

Luther v. Maple, 8 Cir., 250 F. 2d 916, 922;
Sudderth v. National Lead Company, 5 Cir., 272 F. 2d 259, 263;
Citizen's Insurance Company v. Foxbilt, Inc., 8 Cir., 226 F. 2d 641.

CONCLUSION.

It is obvious the Fifth Circuit Court of Appeals found itself in disagreement with the public policy of Georgia and, being in disagreement, declined to follow it. As said in **Angel v. Bullington**, 330 U. S. 183, however

> "A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld."

The situation here presented can be remedied only by grant of certiorari.

Respectfully submitted,

HOSEA ALEXANDER STEPHENS,
2400 First National Bank Building,
Atlanta, Georgia 30303,
Attorney for Petitioners.

MARSON G. DUNAWAY, JR.,
301 South Marble Street,
Rockmart, Georgia 30153,

SMITH, COHEN, RINGEL, KOHLER,
MARTIN & LOWE,
Attorneys at Law,
2400 First National Bank Building,
Atlanta, Georgia 30303,
Of Counsel.